STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion	)	
Investigation concerning Illinois Bell Telephone Company's compliance with Section 271(c) of the Telecommunications Act of 1996	)	No. 96-0404

AMERITECH ILLINOIS' REPLY MEMORANDUM IN RESPONSE TO ORDER INITIATING INVESTIGATION

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Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois") respectfully submits this reply memorandum in response to the Order Initiating Investigation issued by the Illinois Commerce Commission ("Commission") on August 26, 1996. This memorandum addresses legal issues or questions of statutory interpretation raised in the other submissions filed in response to the Order Initiating Investigation.

I. THE MEANING OF SECTION 271(c)(1)(A): PROVIDING ACCESS AND INTERCONNECTION TO A PREDOMINANTLY FACILITIES-BASED PROVIDER.

A. The Requirement That A BOC Be Providing Access and Interconnection Pursuant to an Approved Agreement

Staff appears to agree with Ameritech Illinois with respect to the proper interpretation of the statutory requirement that a BOC be "providing" access and interconnection under the agreement on which it bases its Section 271 application. Staff asserts that the mere existence of such an agreement does not constitute "providing" access and interconnection, and that with

respect to those checklist items that have actually been requested for purchase by the other party to the agreement, a BOC "must actually furnish the access and interconnection." Direct Testimony Of Charlotte F. TerKeurst on behalf of the Staff of the Illinois Commerce Commission, dated November 8, 1996 ("TerKeurst Testimony") at 13, 15.[1] But Staff does not appear to dispute that, if the BOC has not been asked to actually furnish one or more checklist items, it may comply with the Act by making those items available to the other party through the agreement itself and through a statement of generally available terms. See TerKeurst Testimony at 12.

As Ameritech Illinois demonstrated in its opening memorandum (Am. Mem. at 19-22), this is the only sensible construction of the statute. Not surprisingly, therefore, it is the construction that Congress intended. See Conference Report, H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 144 (1966) (emphasis added) (the checklist items must be provided by a BOC under its agreement with a competitor "assuming the other party or parties to that agreement

[1] From its submission, it would appear that Staff interpreted a statement in Ameritech Illinois' opening legal memorandum to suggest that Ameritech Illinois was advocating a "mere agreement is sufficient" position. See Terkeurst Testimony at 13, 25. However, Ameritech Illinois made the statement to which Staff refers (id. at 13) in a completely different context in response to the Commission's Question No. 3 relating to the question whether Section 271(c)(1)(A) imposes a "metrics" test. Thus, Ameritech Illinois' statement (Am. Mem. at 5) that "a BOC will satisfy the requirements of Section 271(c)(1)(A) as soon as it has entered into 'one or more binding agreements' for interconnection" (emphasis added) was meant to rebut the proposition that, in addition to the agreement-related requirements of Section 271(c)(1)(A), a BOC must demonstrate that the market has attained some specified level of competition. Ameritech Illinois did not intend in any way to leave the impression that the Section 271(c)(1)(A) agreements on which a Section 271 application is based need not satisfy all of the requirements of the statute, including the requirement of "providing access and interconnection." In short, Ameritech Illinois' response to Question No. 3 simply did not address the meaning of "providing access and interconnection." Ameritech Illinois addressed that issue in question Nos. 12 & 13. See Am. Mem. at 16-23.

have requested the items included in the checklist"). And Ameritech Illinois' agreements with MFS and CCT satisfy the "is providing" requirement of Section 271(c)(1)(A) because under those agreements Ameritech Illinois (1) is actually furnishing to MFS and CCT all of "the items included in the checklist" that they "have requested" and (2) is making immediately available through the agreements and a General Statement all additional checklist items that MFS and CCT have not specifically asked to purchase.

The only remaining question is whether the word "provide" covers the common sense interpretation intended by Congress. And, based on Staff's dictionary definitions, the answer is clearly "yes." It is indisputable that a BOC is "providing" all checklist items that it is actually furnishing to the competing provider.[2] And as Staff points out, the primary non-archaic definition of the word "provide" is to "make available." See TerKeurst Testimony at 14.

Staff, however, suggests that it may be premature for Ameritech Illinois to proceed with a Section 271 application based on the MFS and/or CCT agreements at this time because AT&T and MCI have requested Ameritech Illinois to actually furnish them with checklist items in addition to those now being furnished to MFS and CCT. See TerKeurst Testimony at 32-35.

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[2] In support of its position that a BOC must actually be furnishing checklist items that the other contracting party has actually requested to purchase, Staff alludes to "problems" that "could arise that would prevent a carrier that has signed an interconnection agreement from actually receiving the contractual services" and to the possibility that a BOC may have "incentives to delay contract performance if it can obtain interLATA entry in the meantime." Terkeurst Testimony at 15-16. Staff's concerns, however, arise only in the situation where the other party to the interconnection agreement has actually requested to purchase "checklist" items. Under these circumstances, Ameritech agrees that the BOC must actually be furnishing those items in order to be "providing" access and interconnection. But Ameritech Illinois is performing its obligation under the MFS and CCT agreements and therefore the Staff's concerns have no bearing on the timing of Ameritech Illinois' Section 271 application.

In Staff's words, "AT&T and MCI have requested each checklist item." Id. at 32. But Staff's assumption that AT&T and MCI have requested Ameritech Illinois to actually furnish – and have committed themselves to purchase – checklist items in addition to those items that are being actually furnished to facilities-based competitors under the MFS and CCT agreements is demonstrably incorrect.

AT&T and MCI have not requested Ameritech Illinois to actually furnish them with a single checklist item. More important, neither AT&T nor MCI has obligated itself to purchase any checklist item that is not already being actually furnished to MFS and CCT. Rather, the agreement that they have "requested" is effectively nothing more than a menu of options from which they can purchase -- when and if they choose. The contracts that AT&T and MCI will have in place by early next year do not require them to buy a single thing; they require Ameritech to provide products, services and network elements when and if AT&T and MCI ask to purchase them.

Ameritech Illinois intends to base its Section 271 application on one or more approved agreements with facilities-based providers. Under those agreements, Ameritech Illinois is providing access and interconnection -- it is actually furnishing all checklist items that have been requested for purchase by the other parties to those agreements and it is making the other checklist items fully available to those parties upon request, pusuant to the terms of such agreements, which incorporate by reference Ameritech Illinois' then existing statement of generally available terms. And Section 271(c)(1)(A) requires no more. Under the Act, having entered into approved Section 271(c)(1)(A) agreements under which it is providing access and interconnection in accordance with the competitive checklist, Ameritech Illinois cannot be

excluded from the long distance market merely because other potential competitors might -- at some unspecified time in the future -- decide to purchase additional checklist items from Ameritech Illinois. This would make potential competitors like AT&T and MCI the gatekeepers to Ameritech Illinois' entry into long distance. By simply not taking a single check list item -- e.g., local switching (which AT&T and MCI probably will not need because they both already have deployed or intend in the near future to deploy their own switches) -- they could delay indefinitely, possibly forever, Ameritech Illinois' entry into long distance. This would not only be monumentally unfair to Ameritech Illinois, but it would harm competition -- and consumers -- in both the long distance and local markets. In short, Ameritech Illinois' position is not an unwarranted expansion of the 1996 Act, as the self-interested long distance carriers would have the Commission believe, but rather a common sense interpretation of the statutory language to achieve the Congressional objective of opening both the local and long distance markets to competition.

B. There Is No Metric Or Market Share Test For Approval Of An Agreement-based Application For Entry Into The Long Distance Market.

The Commission's Question Nos. 3, 4, 5, and 15 were directed at the issue of whether the FCC must determine that the local exchange market has achieved some level of competitiveness before approving an agreement-based Section 271(c)(1)(A) application by Ameritech Illinois to enter the long distance market. As Ameritech Illinois explained in its initial response, there is no requirement under Section 271(c)(1)(A) that the market be "effectively competitive" or that there be a "viable competitive alternative." Indeed, such vague, non-statutory requirements are flatly inconsistent with Congress' express rejection of a "metrics"

test. Congress chose instead to rely on the existence of a qualifying interconnection agreement and satisfaction of the competitive checklist requirement as evidence of competition in the local market. Beyond the criteria explicitly set out in the statute, Congress determined to impose no requirements as to the nature of competing providers or the scope of the service that they offer. See Am. Mem. at 4-7.

Staff agrees with Ameritech Illinois that Section 271(c)(1)(A) does not "contemplate a metrics test." TerKeurst Testimony at 3, 5, 25. Sprint also concedes that "Congress did not intend that the test [under Section 271(c)] should turn on any specific quantitative measure of the competitive LECs' market presence." Sprint's Legal Memorandum In Response To Order Initiating Investigation ("Sprint Mem.") at 1-2; see also id. at 8 ("Given Congress' rejection of a market share or 'metrics' test, it would be imprudent to set an inflexible specific standard for compliance."). Nevertheless, Sprint suggests that these same non-statutory barriers to increased competition in its long distance market be read into the statute under the guise of a "market analysis." Id. at 8. In other words, Sprint wants to sneak the Congressionally rejected "metrics" theory into the Section 271 equation through the back door. And MCI adopts the same tactic, arguing that market shares should be used to establish a "rebuttable presumption" about whether local markets are competitive. MCI Telecommunications Corporation's Legal Memorandum In Response To Order Initiating Investigation ("MCI Mem.") at 33-34.

Ameritech Illinois' position on this issue is clearly set out in its previous submissions to the Commission. See Am. Mem. at 2-7, 29-31. Neither Sprint nor MCI have said anything to refute Ameritech Illinois' basic proposition that Congress clearly rejected such indirect "metrics" tests. The Act simply requires a BOC to be providing access and interconnection in accordance

with the competitive checklist to establish that the BOC's application meets the test of the Act. Indeed, under Track B the statute permits a BOC to compete in the long distance market even in the absence of any facilities-based provider of business and residential local service based solely upon the filing of a statement of generally available terms. Congress required that competitors have an opportunity to compete, not that there be any particular quantum of competition, in establishing the timing of BOC entry into the inter-LATA market.

C. The Meaning of Facilities-Based Competition.

1. "Facilities-Based" Competition Includes Services Provided Through Unbundled Network Elements Leased From The Incumbent LEC.

As Ameritech Illinois demonstrated in its initial response, the statutory language, legislative history, and Congressional purposes behind the 1996 Act establish that leased network elements constitute a competitor's "own" facilities for purposes of the "facilities-based competitor" requirement set forth in Section 271(c)(1)(A). See Am. Mem. at 8-12. Although Staff does not take a position on the leasing issue, it does raise some factual questions relating to the degree of control that a BOC exercises over unbundled network elements. TerKeurst Testimony at 29-30. However, Ameritech Illinois believes that the issues to which Staff alludes do not lead to uncertainty in identifying what is and is not facilities-based competition under the Act.

As the FCC's regulations establish, when a competing provider requests network elements from a BOC, it seeks to purchase "exclusive access" to those elements. In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, ¶ 258 (Aug. 8, 1996). Likewise, the FCC's rules preclude

a BOC from imposing limitations on a competing provider's use of network elements to offer service. See Am. Mem. at 11-12. Accordingly, if a BOC complies with the statute and all applicable regulations, as a matter of law it has done everything that is required to effectively transfer control over the leased network elements to the competitor. By statutory and regulatory definition, the leased elements become the competitor's "own" facilities.

Both Sprint and MCI make a number of arguments why leased network elements should not be considered in defining facilities-based competition, none of which is compelling. First, Sprint asserts that facilities-based competition is limited to title ownership because Section 271(c)(1)(A) does not mention leasing of unbundled elements. Sprint Mem. at 10. This argument simply begs the question. Section 271(c)(1)(A) does not say that title to the facilities in question is required either. It is well established that the term "ownership" encompasses dominion and control over something, title to which is in another.[3] The statute's use of the term "their own," therefore, is the starting point, not the end, of the analysis.

Sprint also cites to the Conference Report (Sprint Mem. at 11), which actually supports Ameritech Illinois' argument. The first sentence of the passage in the Conference Report to which Sprint alludes talks about "a fully redundant network." The second sentence discusses the need of competitors to obtain unbundled elements from the incumbent local exchange carrier.

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[3] See, e.g., People v. Dugan, 125 Ill. App. 3d 820, 830, 466 N.E.2d 687, 694 (1984) (context of legislature's use of term "owner" indicated that "ownership" did not necessarily mean the same thing as having title to property), aff'd in relevant part, 109 Ill. 2d 8, 19, 485 N.E.2d 315, 320 (1985) (title to, and ownership of, property need not necessarily coincide in the same person); Alpha Rho Zeta of Lambda Chi Alpha, Inc. v. Inhabitants of the City of Waterville, 477 A.2d 1131, 1136 (Me. 1984) (the term "ownership" is not strictly limited to title ownership and should be construed, inter alia, in light of the subject matter, the purpose of the statute, the statutory context).

The third sentence then states that the purpose of the "predominantly over their own telephone exchange service facilities" requirement is to "ensure a competitor offering service exclusively through resale of the BOC's telephone exchange service does not qualify * * **". H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 147-48 (1996).

Thus, each sentence in the quoted portion of the Conference Report refers to a different method of providing service: (1) through facilities actually owned by the competitor, (2) through facilities leased from the incumbent, and (3) through resale. Of the three, the only one that the Conference Report excludes from the scope of "predominantly over their own telephone exchange service facilities" is resale. Had Congress intended to exclude services provided through unbundled network elements from the definition of facilities-based competition, it would have stated in the third sentence quoted by Sprint that the purpose of that requirement is to "ensure a competitor offering service exclusively through resale and/or through the leasing of unbundled network elements does not qualify." Indeed, had Congress intended to exclude leased network elements, Section 271(c)(1)(A) itself would have read: "such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with telephone exchange service facilities leased from another carrier or the resale of the telecommunications services of another carrier." Sprint should not be permitted to rewrite the Act.

Third, Sprint's reliance on discussions in the Conference Report concerning competition from cable companies is equally unpersuasive. See Sprint Mem. at 12-13. The fact that Congress referred to cable companies as being facilities-based proves nothing. There is no

evidence that the example of cable companies as being facilities-based was intended to limit the ways in which the statutory requirement could be satisfied. There is no dispute that a company that owns all of its own equipment would be "facilities-based." The issue is whether a company that leases unbundled network elements also might be so considered.

Finally, MCI notes that, for purposes other than defining what constitutes facilities-based competition, the FCC has noted the distinction between a competing provider's "own" facilities and network elements leased from a BOC. See MCI Mem. at 13-15. The only possible response to this argument is: "so what?" Indeed, MCI's argument proves Ameritech Illinois' point -- that the concept of "ownership" does not have a fixed meaning, and therefore its meaning must be derived from the specific context in which it is used. See Black's Law Dictionary 574 (1983) ("[t]he term ["owner"] is nomen generalissimum, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied"). Here, the statute distinguishes services defined as "their own" (i.e., services provided over network facilities that competing providers have leased from a BOC) from services that are simply resold by competing providers. See Am. Mem. at 10. A competing provider's use of leased network elements to provide its own services obviously is different from a competing provider's resale of the BOC's services. Given that there are only two alternatives specified in the statute ("their own" and "resale"), leased network elements necessarily must be categorized as the competing provider's "own" facilities.[4]

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[4] MCI attempts to explain away the juxtaposition in the statute of "their own" and resold services by saying that the reference to resale was meant to refer to the resale of a non-BOC's services. See MCI Mem. at 16-17. However, nowhere in Section 271(c)(1)(A) does it refer to the services of a "non-BOC" carrier. The relevant sentence refers to telecommunications service of a "competing provider" over "their own" facilities versus

2. Under Sprint's View of "Predominantly Facilities-Based" Competition, Ameritech Illinois Would Be Foreclosed Indefinitely From Competing In The Long Distance Market.

The arguments made by Ameritech Illinois' competitors, and in particular the extreme view taken by Sprint, reinforce Ameritech Illinois' position that the statute should not be interpreted in an unreasonable manner that produces absurd results. According to Sprint, the term "predominantly facilities-based competition" means that Section 271(c)(1)(A) is satisfied only if competing providers own title to (not lease) more than fifty-percent of the facilities required to provide local exchange service. However, Sprint does not stop there. Under its theory, not all facilities are equal. Thus, Sprint would require that the "facilities-based" requirement be met only by title ownership of at least fifty percent of the local loop facilities used to provide service -- a test which may never be satisfied. See Sprint Mem. at 15-20.

Of course, there is no basis in the statute for emphasizing any single network element, such as loop facilities, in applying the predominance requirement of Section 271(c)(1)(A). See Am. Mem. at 16 (Commission's Question No. 9). More fundamentally, Sprint's theory produces results that would completely frustrate the pro-competitive purposes of the 1996 Act. It is beyond doubt that no competitor actually will build the majority of its loop facilities in the foreseeable future, if ever. Indeed, Sprint concedes that "[t]his level of market entry * * * probably will not" be achieved for quite some time. Sprint Mem. at 5-6. Thus, under Sprint's definition of "predominantly facilities-based competition," Ameritech Illinois would be foreclosed indefinitely -- possibly forever -- from competing in the long distance market, even

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the "resale of telecommunication services of another carrier." There is no basis whatsoever in the statute for saying that the other carrier whose services are resold cannot include the incumbent LEC.

if Ameritech Illinois were to lose 95% of its market share in the local market to competitors using other strategies against it.

Thus, Sprint's "facilities-based competition" theory, standing alone, is untenable. When combined with its other theories, Sprint's conception of "facilities-based competition" is patently absurd. As noted above, Sprint also takes the positions (1) that any request for interconnection by anyone forecloses the Track B path to interLATA relief and (2) that to successfully pursue a Track A application, the agreements on which the application is based can be used to satisfy the checklist only with respect to those items that are actually being furnished to the other contracting parties. Under Sprint's theory, therefore, if a BOC satisfied Sprint's "predominantly facilities-based" competitor requirement by entering into an agreement with a competitor that had title to the network facilities it would use to provide service, that agreement could not be used as the basis for a Track A application because the competing provider would, by definition, not need and not be purchasing each of the items on the competitive checklist. In short, according to the long distance carriers, Congress established standards for BOC entry into the long distance market that it knew could never be satisfied. This, of course, is ridiculous.

This is just another example of the major players in the oligopolistic long distance market attempting to manufacture implicit regulatory barriers from a deregulatory, pro-competitive statute in order to delay competition on their turf for as long as possible. Under Sprint's preposterous theory, the long distance carriers may lock Ameritech Illinois out of the inter-LATA market into the next millennium through a unilateral decision not to invest in loop facilities -- while using Ameritech Illinois' loop facilities to capture the local market. To put

it charitably, Sprint's theory deprives Ameritech Illinois of the level playing field that Congress sought to create.

The goal of the 1996 Act is to open both the interexchange and local telecommunications markets to the forces of increased competition as quickly as possible.[5] As a result, the FCC has been urged to "act favorably and expeditiously on Bell company petitions to compete in the long distance business * * * once the test for facilities based competition is satisfied."[6] By defining facilities-based competition in such a way as to make it virtually impossible for Ameritech Illinois to enter the long-distance market any time in the foreseeable future, Sprint's theory clashes directly with the manifest purposes of the 1996 Act. The Act was intended to "get everyone into everyone else's business," to set off an "Oklahoma land rush" of competitors towards markets from which they have been artificially and inefficiently barred,[7] to "decompartmentaliz[e] segments of the telecommunications industry, opening the floodgates of competition through deregulation."[8] While Sprint is all in favor of "opening the floodgates" when it comes to competition in the local exchange market, it seeks to impose endless rounds

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[5] See H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996) (purpose of the Act is "to provide for pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition") (emphasis added).

[6] Remarks of Senator Breaux, 142 Cong. Rec., 104th Cong., 2d Sess., p. S713 (Feb. 1, 1996).

[7] 141 Cong. Rec. S7894 (daily ed. June 7, 1995) (statement of Senator Pressler).

[8] 142 Cong. Rec. H1149 (daily ed. Feb. 1, 1996) (quoted in Accounting Safeguards NPRM, ¶ 4 n.5).

of delay for new competition in the long distance market -- delays that are foreclosed by any rational interpretation of the 1996 Act.

II. THE MEANING OF SECTION 271(c)(2)(B); THE COMPETITIVE CHECKLIST

A. A BOC May Satisfy The "Competitive Checklist" Through A Combination Of Section 271(c)(1)(A) Agreements.

As Ameritech Illinois demonstrated in its opening memorandum (see Ameritech Illinois' Legal Memorandum In Response To Order Initiating Investigation ("Am. Mem.") at 18-19), the plain language of Section 271, as well as the design, object and policy of the 1996 Act, make it clear that a BOC may satisfy the "checklist" requirements of Section 271(c)(2)(B) through a combination of Section 271(c)(1)(A) agreements. And no commentator appears to seriously dispute Ameritech Illinois' submission. See, e.g., TerKeurst Testimony at 10 ("Staff agree[s] with Ameritech Illinois that * * * it is reasonable to allow a BOC to satisfy the 'checklist' through a combination of agreements"); MCI Mem. at 26 ("the option for a BOC to satisfy the checklist by using provisions in different approved agreements * * * exists under the statute").

However, Staff asserts that "[a]n agreement with a competing provider should be usable to satisfy Section 271(c) only if the provider already has both residential and business customers for telephone exchange service." TerKeurst Testimony at 7. Ameritech Illinois respectfully disagrees with Staff's position. To begin with, nothing in the statutory language requires that both residential and business customers be served by the same competitor. See Section 271(c)(1)(A) (to satisfy the statutory requirements, the BOC must "enter[ ] into one or more binding agreements" that "specify[ ] the terms and conditions under which the Bell operating company is providing access and interconnection" to "one or more unaffiliated

competing providers of telephone exchange service * * * to residential and business subscribers").

Moreover, the "access and interconnection" that must meet the terms of the "competitive checklist" is the same "access and interconnection" that is to be provided pursuant to the "one or more agreements" described in Section 271(c)(1)(A); and the "competitive checklist" and "residential and business" requirements serve the identical statutory objective -- to ensure that the market is open to competition. And that objective is served whether there is a single competitor operating in both the residential and business markets or two competitors, one operating in the residential market and the other in the business market. In short, the statutory language is consistent with -- and the statutory purposes mandate -- an interpretation of the Act that permits a BOC to satisfy the "residential and business" requirement through a combination of Section 271(c)(1)(A) agreements.

Moreover, the legislative history is inconsistent with Staff's position. In discussing the facilities-based competition requirement, Congress noted that "[s]ome of the initial forays of cable companies into the field of local telephony * * * hold the promise of providing the sort of local residential competition that has consistently been contemplated." See Conference Report H.R. REP. No. 104-458, 104th Cong., 2d Sess. 148 (1996). This reference to cable companies, which typically serve only residential customers, as an illustration of the kind of competitor that would satisfy the facilities-based competition requirement shows that Congress intended that the statute could be met by a combination of at least two agreements, one with a competing provider of residential service and one with a competing provider of business service.

At the end of the day, however, this question of statutory interpretation should prove

academic. Ameritech Illinois has submitted for Commission approval an agreement with Consolidated Communications Telecom Services, Inc. ("CCT"). See Docket 96 NA-005. As Staff acknowledges, CCT "is already serving both residential and business customers." TerKeurst Testimony at 25. Assuming the Commission approves the CCT agreement, Ameritech Illinois' Section 271 application would satisfy even the Staff's interpretation of the "residential and business" requirement.

B. A Statement Of Generally Available Terms May Be Used To Demonstrate Checklist Compliance In An Agreement-based Section 271 Application With Respect To Checklist Items That Have Not Been Requested By The Other Party To The Agreement.

As demonstrated above (pp. 1-5), a BOC is providing access and interconnection pursuant to an agreement when it is actually furnishing the checklist items requested by the competing provider and making available, pursuant to the terms of that agreement, all checklist items that have not in fact been requested for purchase by the competing provider. In attacking this conclusion, Sprint and MCI rely on their assertion that Track A and Track B are mutually exclusive paths to Section 271 interLATA relief -- that if the preconditions for an agreement-based Track A application are satisfied, a Track B application may not be filed. Sprint Mem. at 24-26; MCI Mem. at 27-28. This "mutually exclusive" argument is a classic non-sequitur.

Ameritech Illinois' position is not that a BOC can file a Track B application -- an application based exclusively on a statement of generally available terms and conditions -- notwithstanding the existence of an interconnection agreement with a predominantly facilities-based competitor. At the same time, however, under the Act, the requirements for an agreement-based Track A application, including the checklist requirement, permit a BOC to use other evidence -- including a General Statement under Section 252(f) of the Act -- to prove

checklist compliance with respect to any checklist item as to which there has been no actual request to purchase by the other party to the agreement.

To begin with, this conclusion finds support in the Act. Section 271(d)(3)(A)(i) provides that a BOC may satisfy the prerequisites for FCC approval of a Track A application by "fully implement[ing]" the competitive checklist in accordance with the requirements of Section 271(c)(2)(B). See Section 271(d)(3)(A)(i) ("with respect to access and interconnection provided pursuant to subsection (c)(1)(A)," the BOC must "fully implement[ ] the competitive checklist in subsection (c)(2)(B)"). And Section 271(c)(2)(B) provides that a BOC satisfies the competitive checklist so long as the "[a] access or interconnection provided or generally offered" satisfies the checklist. In short, the statute authorizes the FCC to approve a Track A application supported by evidence -- such as a statement of generally available terms -- that the BOC has in fact fully implemented the checklist.

Moreover, Section 252(f), which defines and sets out the requirements for a statement of generally available terms, precedes and is entirely independent of the statutory provision relating to Track B applications (Section 271(c)(1)(B)). Although a General Statement is a necessary predicate for a Track B application, there is nothing in the Act to suggest that a statement of generally available terms may serve no function other than supporting a Track B application. Such language could easily have been included in Section 252(f), Section 271(c)(1)(B) or 271(c)(2)(B), and was not. It should come as no surprise, therefore, that the Hearing Examiner in Docket No. 96-0491 expressly rejected the position of Sprint and MCI that a statement of generally available terms may be used only to support an application under Track B, affirmatively stating that a statement of generally available terms may serve a useful

purpose regardless of whether Track B is followed. See Hearing Examiner's Proposed Interim Order, Docket No. 96-0491.

In short, the Act obviously contemplates that the filing of a General Statement under Section 252(f) is an independent, stand-alone procedure that may by followed by a BOC at any time. Whether the statement so filed may be used by a BOC to demonstrate checklist compliance with respect to a checklist item that has not been requested by the other party to an agreement on which a Track A application is based is in the first instance for the FCC to decide. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984); see also Morton v. Ruiz, 415 U.S. 199, 231 (1974). And Ameritech Illinois is convinced, based on the language, structure, design, and policies of the statute, that the FCC will permit use of the General Statement as evidence that access and interconnection made available to competing providers in approved Section 271(c)(1)(A) agreements in fact comply with the competitive checklist. See Am. Mem. at 20-23.

III. IF COMPETING SERVICE PROVIDED THROUGH LEASED NETWORK ELEMENTS IS NOT FACILITIES-BASED COMPETITION UNDER TRACK A, THEN AMERITECH ILLINOIS QUALIFIES FOR INTERLATA RELIEF UNDER TRACK B.

Section 271(c)(1)(B) provides an alternative route to Section 271(c)(1)(A) for a BOC to enter the long distance market. As a general matter, a BOC may file a Section 271 application premised on Track B if no competing provider "has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) * * *". If the BOC has not received any qualifying

request, then subsection (B) allows it to enter the long distance market based solely on a statement of generally available terms.

Sprint and MCI assert that Ameritech Illinois is "ineligible for Track B," supposedly because Track B is not available where requests have been made for interconnection, and such requests have been made in Illinois. Sprint Mem. at 27; see also MCI Mem. at 19-24. This argument, however, seriously misreads Section 271(c), which plainly does not provide that any request for interconnection from any competing provider necessarily derails or forecloses a Track B application.

The key statutory language provides as follows:

> "A Bell operating company meets the requirements of this subparagraph if, * * * no such provider has requested the access and interconnection described in subparagraph (A) * * * ".

Section 271(c)(1)(B). Sprint and MCI state that the reference to "no such provider" means any unaffiliated competing provider of telephone exchange service. But as Representative Tauzin made clear, the phrase "no such provider" actually refers back to the facilities-based provider described in Section 271(c)(1)(A):

> "Subparagraph (B) uses the words 'such provider' to refer back to the exclusively or predominantly facilities based provider described in subparagraph (A)."

141 Cong. Rec., 104th Cong., 1st Sess. p. H 8458 (Aug. 4, 1995). Furthermore, even if it could be said that the phrase "no such provider" refers to any unaffiliated competing provider of telephone exchange service, subsection (B) also states that the only type of request that disqualifies a Track B application is one that seeks "the access and interconnection described in subparagraph (A) * * * ". A request for access and interconnection qualifies under

subparagraph (A) only if, inter alia, the telephone exchange service being offered by the competing provider is facilities-based, as that term is defined in Section 271(c)(1)(A).

Sprint asserts that the facilities-based requirement is limited to Track A because the requirement as set out in subsection (A) is preceded by the language "[f]or the purposes of this subparagraph." Sprint Mem. at 28. Of course, subsection (A) does not state "for the purposes of this subparagraph only," although MCI, incredibly, attempts to add that word to the statute. See MCI Mem. at 21. In addition, Sprint simply ignores that subparagraph (B) expressly incorporates the definitions in subparagraph (A), including the definition of a facilities-based provider, when it refers to the "access and interconnection described in subparagraph (A)."

In short, a qualifying request that would preclude a Track B application is only one that is made by a facilities-based competitor. As the Conference Report succinctly states, "a BOC may seek entry under [Track B] * * * provided no qualifying facilities-based competitor has requested access and interconnection * * *" by the appropriate date. H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 148 (1996).[9] Accordingly, although Ameritech Illinois believes that one or more of the carriers that made requests for interconnection prior to September 8, 1996 is a

[9] Ignoring this unequivocal statement in the Conference Report, MCI focuses on statements in the congressional record that relate to a Track A application. See MCI Mem. at 22. The fact that numerous legislators commented on the significance of the facilities-based requirement under Section 271(c)(1)(A) simply does not establish that, in the absence of facilities-based competition, Track B would be foreclosed. Indeed, the opposite is true: As the Conference Report states, Track B "is intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new Section 271(c)(1)(A) has sought to enter the market." H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 148 (1996) (emphasis added). MCI's "conspiracy theory" pursuant to which Track B is available solely in the case of an orchestrated boycott (see MCI Mem. at 23) is completely outside the text of the statute and is not supported by even a shred of legislative history.

qualifying, facilities-based carrier that satisfies the requirements of Section 271(c)(1)(A), if Sprint and MCI were correct that a competing provider must have title ownership of more than 50% of the local loop facilities to qualify as a predominantly facilities-based provider, then no competitor would qualify as facilities-based. In that case, there would have been no qualifying request for access and interconnection under Track A, and Ameritech Illinois would be entitled to proceed under a Track B process.

IV. THE ILLINOIS COMMERCE COMMISSION HAS A VITAL ROLE TO PLAY IN THE SECTION 271 PROCESS.

In its submission, the Public Utilities Bureau of the Office of the Attorney General suggests that Ameritech Illinois considers the Commission to be "nothing more than an administrative recordkeeper" in the Section 271 process. Comments of the People of the State of Illinois on Ameritech Illinois' Legal Memorandum in Response to Order Initiating Investigation, dated November 8, 1996 at 3. Nothing could be further from the truth. In stark contrast to the position advocated by other commentors in this docket,[10] Ameritech believes that the ICC is much more than an "administrative record keeper," and the notion that the Commission's "informed judgment" and "expertise in public policy" is vital for the enhancement of competition in both the local and long distance markets -- far from being "contrary" to Ameritech's view -- is precisely Ameritech's view.

Under the 1996 Act, the Commission will play a key and critical role with respect to any application for long distance authorization that Ameritech files for Illinois. Under Section

[10] See, e.g., MCI Mem. at 40 (although Section 271(d)(B) requires the FCC to consult with the ICC, the FCC need not give the state commission's "comments any particular weight or deference").

271(d)(2)(B) of the 1996 Act, before the FCC makes a final determination regarding long distance authorization for Ameritech, the FCC "shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)." (Emphasis added.) The "requirements of subsection (c)" relate to the requirements that an applicant enter into one or more interconnection agreements with competing providers (or, in some circumstances file a General Statement) and that the applicant satisfy the items in the "competitive checklist." These are critical issues on which the FCC will undoubtedly seek consultation with the Commission: they are issues on which Ameritech is cooperating with the Commission so that the Commission will be fully informed concerning the current status of Ameritech's activities to comply fully with the applicable statutory and regulatory requirements.

There are other public interest areas as well where the expertise of the Commission may come into play. The Commission has long advocated the opening of the local exchange business to increased competition, and it has collected data concerning the nature and degree of competition in that business. Moreover, the Commission is obviously intimately familiar with the regulatory restrictions under Illinois law that inhibit the ability of any telecommunications carrier in this State to engage in anticompetitive acts of discrimination and cross-subsidization. As Ameritech suggested in its Legal Memorandum in this docket (at 27), it expects the FCC to inquire into the nature and extent of local exchange competition in Illinois and the efficacy of regulatory restrictions to inhibit potential anticompetitive activity as part of its public interest inquiry prior to granting long distance authorization. Ameritech anticipates that the FCC would receive with interest the Commission's views and analyses of these important issues. At the end

of the day, however, all agree that, under the 1996 Act, it is the FCC alone that must make the final determination to grant or reject an application for long distance authority. See, e.g., Sprint Mem. at 36-37; MCI mem. at 40.

V. AMERITECH ILLINOIS' RIGHT TO ENTER THE LONG DISTANCE MARKET DOES NOT DEPEND IN ANY WAY ON RESOLUTION OF ACCESS CHARGE ISSUES.

MCI disagrees with this Commission's Order deciding that Sections 251(c)(2) and (3) of the 1996 Act do not require incumbent LECs to provide cost-based access charges. MCI Mem. at 28. Undaunted, MCI seeks to circumvent the Commission's decision by using Section 271(d)(3)(C) to achieve the same result. But there is no statutory basis for holding a BOC's Section 271 application hostage to the long-distance carriers' access charge agenda.

As Ameritech Illinois previously explained (Am. Mem. at 32), the 1996 Act expressly states that the exchange access requirements in effect immediately prior to the Act's enactment shall remain in effect after the statute's enactment until superseded by new regulations. Section 251(g). And there is no requirement in the Act that the FCC issue new regulations by a certain date. Moreover, Section 271(d)(1) states that a BOC may file an application seeking authorization to provide in-region inter-LATA services at any time "[o]n or after the date of enactment" of the statute. And the FCC must act on that application within 90 days. Taken together, these provisions clearly demonstrate that a Section 271(c) application may be granted apart from -- and, more important, prior to -- any consideration of the access charge issue.

Finally, it is perfectly clear why Congress saw no need to make access charge reform a condition precedent to inter-LATA relief. Section 272(e)(3) insures that the incumbent LEC could not obtain any advantage vis a vis long-distance carriers from access charges that exceed

economic costs: it requires that the incumbent "charge [its long distance] affiliate . . . an amount for its telephone exchange services and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service . . . "

In short, the Act makes clear that Ameritech's right to compete in the long distance market is in no way dependent on the resolution of any access charge issue.

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